Supreme Court, U.S.
FILED
SEP 19 2005
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No: 05-811

In the

Supreme Court of the United States

LILLIAN BULLARD

Petitioner,

V.

INKSTER HOUSING AND REDEVELOPMENT COMMISSION, TONY LOVE, MELODY COFFEE, LEOTYNE MONTGOMERY, FLOYD SIMMONS, AND EARNESTINE CARTER,

Respondents.

On petition for writ of certiorari from the United States Sixth Circuit Court of Appeals, 04-1051

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS MISAPPLY THE HOLDING OF THIS SUPREME COURT IN DESHANEY IN OPPOSITION TO THE MULTITUDE OF OTHER CIRCUIT COURTS WHEN IT DETERMINED THAT RESPONDENT DID NOT ACT WITH DELIBERATE INDIFFERENCE TOWARD PETITIONER UNDER A STATE CREATED DANGER THEORY OF SUBSTANTIVE DUE PROCESS VIOLATION WHEN RESPONDENTS REMOVED PETITIONER'S DEADBOLT LOCK WHILE ITS OWN POLICIES FREELY DISTRIBUTED MASTER KEYS TO THE CRIME RIDDEN HOUSING COMPLEX, CAUSING PETITIONERS RAPE AND ATTEMPTED MURDER?

The District Court says, NO.
The United States Sixth Circuit Court says, NO
Respondent says, NO.
Petitioner says, YES.

IN THE SUPREME COURT
OF THE UNITED STATES

LILLIAN BULLARD, CASE NO:

Petitioner, US Sixth Circuit No: 04-1051

V E.D. Mich. No. 02-CV-74608

INKSTER HOUSING
AND REDEVELOPMENT COMMISSION, et al.

Respondents.

DISCLOSURE OF CORPORATE
AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 29, Lillian Bullard makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**

If the answer is "yes," list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

2. Is there a publicly owned corporation, not a party to the case, that has a financial interest in the outcome? **NO.**

If the answer is "yes," list below the identity of the corporation and the nature of the financial interest.

Richard H. Morgan, Jr. 12-14-05

Richard H. Morgan, Jr. **Date**

TABLE OF CONTENTS

QUESTIONS PRESENTED		ii
DISCLOSURE STATEMENT . . .		iii
INDEX OF AUTHORITIES		v
OPINIONS BELOW		1
STATEMENT OF JURISDICTION . . .		1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED		1
STATEMENT OF THE CASE . . .		3
REASONS FOR GRANTING THE WRIT. . .		8
Appendix . .	Bullard v Inkster, et al., Unpublished Sixth Circuit Court of Appeals, 04-151	17
Appendix . .	Bullard v Inskter, et al, Opinion and Order E.D. Mich. 02-CV-74608	25
Appendix C	Bullard v Inkster, et al. Order Denying Rehering En Banc	47

INDEX OF AUTHORITIES

CASES

UNITED STATES SUPREME COURT

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 197, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) . . . 10, passim

Moore v. City of East Cleveland, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977) . . 11

Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973) 11

Union Pac. Ry. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891) . . 11

UNITED STATES COURTS OF APPEAL

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir.1982). 13

Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir.2003) . . . 7

Dwares v. City of New York, 985 F.2d 94 (2nd Cir. 1993) 12

Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990) . 12

Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998). 10

Kneipp v. Tedder, 95 F.3d 1199 (3rd Cir. 1996) . 13

Monfils v. Taylor, 165 F.3d 511 (7th Cir. 1998) . 12

Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir. 1997) 12

Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir.1993) 13

FEDERAL DISTRICT COURTS

Maxwell ex rel. Maxwell v. School Dist. of City of Philadelphia, 53 F. Supp. 2d 787 (E.D. Pa. 1999) 13

STATUTES AND CONSTITUTIONS

42 USC § 1983 . . . . . passim
U.S. Const. Art. V 2
U.S. Const. Art. XIV 2

OPINIONS BELOW

The June 20, 2005 decision of the Court of Appeals Denying Rehearing En Banc is not reported (APX C). The decision of the Court of Appeals on the Merits (APX A) is reported at 126 Fed Apx. 717 (2005). The decision of the District Court (APX B) addressing the State Created Danger/Civil Rights issue is unreported.

JURISDICTION

On June 20, 2005, the Court of Appeals denied plaintiff's timely petition for rehearing en banc. The Court of Appeals original opinion was entered March 29, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act of omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Const. Art. V provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Art. XIV provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This substantive due process case began with the brutal rape and attempted murder of 62-year-old Lillian Bullard at the Twin Towers housing project located in Inkster, Michigan. Ms. Bullard was attacked in her own apartment after the defendant Inkster Housing Commission forced Ms. Bullard to remove her deadbolt lock from her door, and refused to repair her door chain lock which was too long to be effective. Despite the knowledge that various vagrants and criminals would enter the premises, defendants had a policy of allowing access to the master keys to the entire housing complex, including other buildings, to almost anyone. Despite locking her door and windows, Ms. Bullard's rapist entered her apartment, ostensibly by the use of one the various unaccounted for master keys. The U.S. District Court for the Eastern District of Michigan granted summary judgment to defendants, rationalizing that the state actors' actions did not amount to deliberate indifference to Ms. Bullard's civil rights. The U.S. Court of Appeals for the Sixth Circuit affirmed. The decision rests on an erroneous interpretation of the due process clause of the United States Constitution, conflicts with interpretation of this and other courts, and raises an important question of law warranting this court's plenary review.

1. Background

Lillian Bullard was a resident at the Twin Towers Housing project in the City of Inkster Michigan on November 21, 2000. Inkster Housing and Redevelopment Commission ("IHRC"), and its employs, were responsible for the administration, maintenance, management, and security of the Twin Towers building, and received federal funding from the Department of Housing and Urban Development.(APX, 27)

Residents of the project were required to meet federal guidelines for residence by age and income. The lease agreement was rife with resident obligations, raising expectations that residents would be in an otherwise safe haven in the otherwise crime-ridden neighborhood. IHRC promised to maintain the premises in a safe condition and to comply with all regulations.(APX, 27-28)

However, Twin Towers was not remotely safe. It had received various failing grades for screening of applicants, security, and inspections, and was referred to HUD's Troubled Agency Recovery center. A plethora of residents who did not meet the age and income requirements were allowed to move in. The former typist for the office was promoted to acting manager of the complex despite having no experience. Criminal background checks were not performed, despite the express policy.

Although residents were charged a monthly guard fee, no guards were present; rather, the money was paid to residents to basically be hall monitors. A door buzzer system was used for entry to the front door; however, the desk that monitored the door was often unstaffed or staffed by residents who were lax in their duties. Strange men often loitered near the front door, and the desk visitor log was not monitored. One of the master keys which would allow entrance to any apartment in Twin Towers, as well as any apartment within the IHRC system was simply left in a drawer at the desk.[APX 33-34]

IHRC knew of the lax policy regarding the master keys, as well as the existence of various unaccounted-for master keys. Indeed, IHRC did not even keep any records on the number or whereabouts of the master keys. The IHRC Director admitted that he did not even know what a master key was. Various individuals, such as outside contractors, barred tenants, and current tenants all possessed keys.[APX 18]

Regardless of the ineffectiveness of the front door security, access to the building was easily obtained through the ground level doors which were often propped open, a fact which Ms. Bullard specifically complained about to management. Fire doors were left propped open, and the alarms wires cut, for months. First floor windows had no locks.

This lack of security allowed various strangers to enter the building. Vagrants were found sleeping in stairwells and camped out in the laundry room; even the hall monitors were afraid to go the basement where the "crackheads, homeless, and squatters lived." Various individuals had let themselves into residents apartments with keys.[APX 34]

Residents complained of the security concerns at resident meetings, to no avail. Ms. Bullard attempted to make her apartment as safe as possible. She placed rods in her windows to prevent their opening; further, her apartment already had a deadbolt lock installed when she moved in. She also had a chain lock, which was woefully too long to prevent its disabling by a person outside of the door.

This momentary safety was short lived after employees of IHRC, on direct orders, removed all of the deadbolts from the doors in Twin Towers. Further, Ms. Bullard put in a work order to maintenance to fix the door chain, which went unanswered.[APX 18, 34]

On November 21, 2000, the inevitable happened. Ms. Bullard locked her windows with wooden rods, locked her door, enabled her chain lock, and took a nap. She was awakened when an unknown intruder peered inside her bedroom door. The intruder raped and sodomized the woman, then tried to strangle her with a vacuum cord. When this was unsuccessful, he stabbed her repeatedly. She survived her wounds after crawling out to the hallway and being discovered by a neighbor.

2. **Initial Proceedings in District Court**

Petitioner filed suit in the U.S. District Court, Eastern District of Michigan, against the IHRC and its employees Tony Love, Melody Coffee, Leontine Montgomery, Floyd Simmons, and Earnestine Carter (who were involved in various management and supervisory roles) in Case No. 2002-74608 before Hon. District Judge Robert H. Cleland on November 19, 2002. The complaint was amended twice, culminating with the second Amended Complaint filed September 15, 2003.

Petitioner alleged a violation of her civil rights to liberty and bodily integrity pursuant to the due process clauses of United States Constitution and 42 USC § 1983. Petitioner also alleged a violation of procedural due process based upon property interests from residency in a government funded housing project pursuant to 42 USC § 13601 et seq, although that claim is not on appeal in this petition and was abandoned at the U.S. Sixth Circuit proceedings. Petitioner also alleged state law claims of breach of contract, gross negligence, violation of state housing law, and violation of state consumer act protections, also not on appeal in this petition.[APX 28]

After voluminous discovery, defendants filed their motion for summary judgement. No oral argument was undertaken, and the court rendered its decision on November 26, 2003. The Court granted defendants' motion in part, holding that no special relationship existed between Ms. Bullard and the IHRC that would render her unable to defend herself. The Court also held that the ostensibly affirmative acts of giving out master keys to residents and removing the deadbolts did not create a state created danger to Ms. Bullard because it did not rise to the level of a special danger toward Ms. Bullard, nor did it create an atmosphere of deliberate indifference to a known danger to plaintiff individually.[APX, 37]

The District Court also dismissed Petitioner's procedural due process claim, holding that petitioner did not have a property interest in safe housing, nor was there any deprivation of notice or the opportunity to be heard.[APX, 41]

Finally, the Court dismissed, without prejudice, all of Petitioner's state law claims.

3. The Court of Appeals Decision

On appeal, Petitioner argued argues that several different affirmative acts establish the first prong of the state-created danger test announced in Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir.2003). Petitioner argued that the IHRC's removal of her deadbolt despite its knowledge that it had not properly accounted for all master keys was an affirmative act. Appellant Br. 35. Petitioner further argued that the IHRC's failure to shorten the chain on her door, permitting unauthorized persons to enter the apartment building (be they illegal residents or vagrants), and distributing master keys without keeping appropriate records, all constitute affirmative acts. Appellant Br. 35–36.

The Circuit Court disagreed, finding, as did the District Court, that the activities complained of sounded in negligence in acts or omissions, rather than affirmative acts. Further, the Court refused to entertain Petitioner's "special danger" argument, holding instead that the determination of deliberate indifference was outcome determinative.[APX, 21]

As to the question of whether the IHRC and its employees acted with deliberate indifference to the rights of Petitioner, the Circuit Court affirmed the District Court's determination that they did not. Relying solely on Circuit Court precedent, the Court held that Petitioner could not show that IHRC or its agents knew, or should have known, that its failure to maintain control over the master keys would specifically endanger Petitioner. The Court held specifically:

> While this court might agree that removing the deadbolt before accounting for all master keys could constitute a negligent act, the deadbolt was removed at the direction of HUD to aid the IHRC in assisting its elderly residents in case of an emergency. Obviously, on the whole, the IHRC was attempting to decrease, rather than enhance, the level of danger to its elderly residents. In addition, while Plaintiff presented evidence that the City of Inkster, in general, has a high crime rate, Plaintiff presented no evidence that other crimes of a similar nature had previously occurred in the building or anywhere in the public housing complex that would make the IHRC aware of the potential for an assault such as Plaintiff suffered. [APX, 22]

Petitioner did not appeal the District Court's dismissal of her procedural due process claim, nor the dismissal without prejudice of her state law claims.

Petitioner timely filed a Motion for Rehearing en banc, which was denied by the Circuit Court on June 20, 2005.

REASONS FOR GRANTING THE WRIT

IHRC is a governmental body whose primary purpose is to provide low income residents with safe, affordable housing. Indeed, IHRC specifically promises to its residents that it will follow appropriate regulations and maintain safe housing. However, its track record is nothing short of abysmal. IHRC receives failing marks in all safety categories, from criminal background checks to building safety.

The failure of IHRC in its charter to its residents becomes obvious from the complete lack of any safeguards as to the whereabouts of and access to the master keys for the entire IHRC system. Despite being informed about the pressing safety problem, so much so that even its own hall monitors were afraid to enter certain areas of the Twin Towers building, it refused to implement any safety measures. Worse, it removed any ability of Petitioner to defend herself from the multitude of potential intruders who either possessed outright, or had access to, the master keys.

IHRC specifically endangered Petitioner by removing her deadbolt lock, which was installed prior to her residency. IHRC exacerbated this danger by failing to fix Petitioner's chain lock, despite her previous work order request. This refusal to do anything to insure the safety of Petitioner, and removal of her only means of defense from key wielding intruders was a recipe for disaster with the inevitable consequence that Petitioner was attacked in her own, barely surviving the brutal assault.(APX 34-35)

In crime ridden, low income areas such as Inkster, individuals such as Petitioner must necessarily rely upon government to perform its stated functions. When that becomes impossible, they must rely upon themselves; however, IHRC refused to protect Petitioner, and then took away any opportunity she would have to protect herself, despite knowing the dangers. This is clear cut deliberate indifference.

1. The Sixth Circuit's decision was based primarily upon Sixth Circuit precedent, in determining whether deliberate indifference existed. However, the Court's determination misapplies even the lessons of its own precedent, and flies in the face of this Court's holdings regarding the issue.

This Supreme Court originally granted certiorari to determine when, if ever, the failure of a state or local

governmental entity or its agents to provide an individual with adequate protective services constituted a violation of the individual's due process rights because of the split in lower court authorities and the importance of the issue to the administration of state and local governments in the seminal DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 197, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). It is again necessary for this Court to grant certiorari due to the various interpretations by the Circuits of that decision.

In DeShaney, this Supreme Court noted that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." However, while this Court denied relief in that case, it explained that it was not considering a case where a person suffered injuries either while in state custody *or because of state acts that made him more vulnerable to private violence. Id.* at 201, 109 S.Ct. 998. Instead, *DeShaney* involved a situation where a state's involvement placed the victim "in no worse position than that in which he would have been had it not acted at all." *Id.*

The Sixth Circuit clearly misapplied DeShaney. Indeed, the Sixth Circuit Court's own interpretation of DeShaney, outlined in Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998), relied on by the Sixth Circuit in the case at bar, reiterates this point, stating that the state may not cause or even greatly increase the risk of harm to its citizens without due process through its own affirmative actions. As noted by even the trial court in this case, the removal of the deadbolt and distributing keys to four unqualified tenants, at a minimum, was an affirmative act. It is preposterous to believe that these actions did not increase the danger to Petitioner. Further, the Circuit Court specifically held that IHRC deliberated as to the issue of distribution of the master keys. It could not be said that their resulting decisions were anything but indifferent.

DeShaney stands for the proposition that the state may not place a citizen in more danger to private violence without due process of law, the essence of the substantive due process clause of the United States Constitution. This substantive component of the Due Process Clause includes not only the privileges and rights expressly enumerated by the Bill of Rights, but includes the fundamental rights implicit in the concept of ordered liberty, Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973), and "deeply rooted in this Nation's history and tradition[s]." Moore v. City of East Cleveland, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977).

It is hard to imagine any deeper a right rooted in this Nation's history than the right of self preservation; i.e. the right to defendant one's self from obvious danger. Indeed, quintessential of the historic liberties long cherished at common law was the right to be free from "unjustified intrusions on personal security." *See* Ingraham, 430 U.S. at 673, 97 S.Ct. at 1413. As far back as 1891, this Supreme Court recognized that "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pac. Ry. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891). A corollary to this right, recognized by the state created danger theory and memorialized by DeShaney is that the government may not take away that right, and fail in every regard to even attempt to protect Petitioner from the dangers. There is no doubt that IHRC did just that.

The Sixth Circuit has supported this integral view of the right to self defense. An individual's "interest in preserving her life is one of constitutional dimension." Nishiyama v. Dickson County, 814 F.2d 277, 280 (6th Cir.1987). However, the Circuit Court refused to uphold this binding precedent, or the intent of the framers in drafting the

due process clause, by refusing to accept the IHRC's utter disregard of Petitioner's safety after taking away her only weapon against the literally hordes of individual with access to master keys in the crime ridden City of Inkster housing projects.

2. The Sixth Circuit's decision is contradictory to that of several other circuits, including the 2nd, 3rd, 7th, 8th, and 9th Circuits. In Dwares v. City of New York, 985 F.2d 94 (2nd Cir. 1993), plaintiff alleged that the police had an agreement with "skin heads" that they could harass and assault persons burning the American flag as long as they did not get out of control. Plaintiff was assaulted and the police did not intervene. In allowing the substantive due process claim to continue, it was reasoned that the violence was not solely the result of private action when the state interferes with protective services otherwise available. Id. at 99. This is the same as the case at bar, where IHRC interfered with the available dead bolts installed on Twin Towers doors. See also Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990).

The Sixth Circuit's decision is also in opposition to the Seventh Circuit's holding in Monfils v. Taylor, 165 F.3d 511 (7th Cir. 1998). In that case a state created danger was found after a police department released a tape of a man telephoning the police informing them of planned illegal activity by a coworker. The perpetrator was stopped and suspended from work. After the perpetrator obtained the tape, he tracked down the caller and killed him. See also Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir. 1997)(State created danger caused by police taking wounded individual into house and canceling paramedic call).

Indeed, even Judge Posner has weighed in on the subject, offering the classic and oft-quoted metaphor for a state-created danger: "[i]f a state puts a man in a position of danger from private persons and then fails to protect him ··· it is as much an active tortfeasor as if it had thrown him into a

snake pit." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir.1982).

It cannot be argued that the massive failures by staff and management of IHRC in failing to check criminal backgrounds, control master key access, monitor hallways and control building access is anything less than throwing Petitioner into the proverbial snake pit. However, in the case at bar, IHRC also took away her "snake bite antidote" - the deadbolt on her door. See also Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir.1993) (finding that plaintiffs may state a claim under § 1983 where they allege state action that creates or contributes to the creation of a danger rendering citizens more vulnerable to harm).

Similarly, the Third Circuit in Kneipp v. Tedder, 95 F.3d 1199 (3rd Cir. 1996) held that the state created danger theory of due process violation applied to a situation where a police officer encountered a man arguing with his visibly intoxicated wife. After dismissing the husband, police later released the wife allowing her to walk home alone where she eventually stumbled into an embankment causing injuries. The mere act of allowing her to walk home in her condition, when she originally had the protection of her husband was considered an affirmative act of the officers that increased her danger, just like the act of removing the dead bolts in the crime ridden building where anyone and everyone had access to master keys.

The need for bright line rules and more definitive case law regarding the state created danger theory can be seen from the multitude of District Court approaches to the subject. Of note is Maxwell ex rel. Maxwell v. School Dist. of City of Philadelphia, 53 F. Supp. 2d 787 (E.D. Pa. 1999), in which the plaintiff was a special education student attending a Philadelphia public school when she was attacked and raped in her classroom by fellow students. The court, applying the Third Circuit's test for liability under the state-created danger theory as established in Kneipp, supra , found

that a properly alleged § 1983 claim was established. The school authorities had locked the door to the plaintiff's classroom while the plaintiff was inside, "effectively blocking a student's ability to leave the room." A substitute teacher in the room stood by and did nothing while students committed the sexual assault on the plaintiff. Central to the court in its consideration was the fact that the state actors, by locking the classroom door, had isolated vulnerable students with their attackers, placing the victim "directly in harm's way."

Had Petitioner's claim been brought in the Third Circuit, the results would have been drastically different than in the case at bar. IHRC blocked any ability Petitioner had to defend herself, taking away her ability to defend the only entrance to her apartment. Clearly it is time for this Supreme Court to address this important issue and bring uniformity to the Circuits.

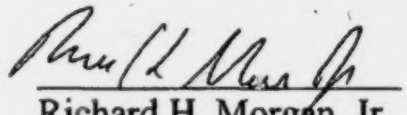
3. This type of case is likely to be repeated. The City of Inkster, like many municipalities across the nation, and especially in the State of Michigan, is undergoing tremendous financial difficulties. Indeed, IHRC appointed a clerk-typist with no experience to manage Twin Towers. The guard fees paid by residents went to other residents who acted as Hall monitors, not guards. Safety features, such as alarms on fire doors, were not repaired.

As financial difficulties continue to rise, municipalities and their respective housing commissions will continue to be forced to cut costs and services to the people who need them most. As more and more tenants will become under the auspices of these financially strapped entities, it is important that the Circuits and respective District Courts have guidance as to how these policies of deliberate inaction and even direct action making the projects less safe impact on the citizenry's Constitutional rights. The boundaries of constitutionally acceptable indifference must be delineated

for both tenants and the municipalities. For tenants, this must be done to allow them to know what to expect from the municipalities in terms of their safety; for governments, a baseline for which their services may not fall without risking civil action and financial consequences.

WHEREFORE, Petitioner Lillian Bullard respectfully requests this Court GRANT her petition for writ of Certiorari to the United States Sixth Circuit Court of Appeals in this case.

Dated: November 15, 2005



Richard H. Morgan, Jr.
Counsel of Record

A

United States Court of Appeals,

Sixth Circuit.

Lillian BULLARD, Plaintiff-Appellant,

v.

INKSTER HOUSING AND RE-DEVELOPMENT COMMISSION, et al., Defendant-Appellee.

No. 04-1051.

March 29, 2005.

On Appeal from the United States District Court for the Eastern District of Michigan.

Noreen L. Slank, Collins, Einhorn, Farrell & Ulanoff, Southfield, MI, for Plaintiff-Appellant.

Matthew A. Brauer, Rutledge, Manion, Rabaut, Terry & Thomas, Detroit, MI, for Defendant-Appellee.

Before BOGGS, Chief Circuit Judge; KENNEDY and MARTIN, Circuit Judges.

KENNEDY, Circuit Judge.

Plaintiff–Appellant Lillian Bullard appeals the district court's grant of summary judgment in the 42 U.S.C. § 1983 action in which she alleged violations of rights resulting from a state-created danger, created by the affirmative acts of the Inkster Housing and Re–Development Commission (IHRC) and its employees. We affirm the judgment of the district court.

BACKGROUND

This appeal stems from a rape and assault that occurred in November of 2000 at the Twin Towers apartment complex in Inkster, Michigan. The Twin Towers complex is a federally subsidized, low-income public housing complex for the elderly. The complex is owned and operated by the IHRC, a state agency.

In her complaint, Appellant alleged that her assailant, whose identity is unknown, gained entry to her apartment through the use of a building master key that he allegedly procured due to lax policies regarding those keys. She also alleged that the assault occurred because the IHRC did not replace a chain on her door that was too long and because the IHRC complied with a Housing and Urban Development (HUD) directive to remove her deadbolt lock despite the fact that the IHRC had not properly accounted for all building master keys. Based on these facts, Appellant claimed the IHRC exposed her to a "state-created danger" as described by this circuit in *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir.2003) and in violation of her rights under 42 U.S.C. § 1983. She also alleged several state law claims. The district court granted summary judgment to Defendants with respect to Appellant's claims, because Plaintiff could not point to any facts or evidence that would indicate that Defendants acted with deliberate indifference:

Most of Plaintiff's allegations cannot satisfy the "affirmative act" element of a state-created danger claim. Failing to keep accurate records of master keys, failing to implement a policy for disseminating and controlling master keys, permitting unauthorized residents to live at Twin Towers, failing to conduct criminal background checks on residents, and failing to correct or repair security violations or risks are all omissions. Thus, the only two possible affirmative acts are (1) the decision to issue master keys to

four residents, and (2) the affirmative removal of all private dead-bolt locks from the apartment units. Even assuming these two acts meet the first element of a state-created danger claim for violation of substantive due process under § 1983, Plaintiff cannot establish that either of these two acts created a "special danger" or that Defendants' conduct would permit a reasonable jury to concluded [sic] that it acted with "deliberate indifference." Joint App. (JA) at 54–55.

The district court declined to exercise supplemental jurisdiction over the remaining state law claims. This appeal followed. Plaintiff–Appellant does not appeal the district court's holding that her tenancy in this senior citizen facility did not count as a special relationship under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197–98, 109 S.Ct. 998, 1003, L.Ed.2d 249 (1989). *See Sargi v. Kent Bd. of Educ.*, 70 F.3d 907, 910 (6th Cir.1995).

ANALYSIS

A. Standard of Review

This court reviews a grant of summary judgment *de novo*. *Adams v. City of Auburn Hills*, 336 F.3d 515, 518 (6th Cir.2003). For the purposes of this appeal, we construe the evidence in the light most favorable to Appellant and draw all reasonable inferences in her favor. *Aiken v. City of Memphis*, 190 F.3d 753, 755 (6th Cir.1999) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). We may affirm only if, after viewing the facts of the case in the light most favorable to Appellant, the law would not permit her any recovery. *Aiken*, 190 F.3d at 755.

B. State–Created Danger Test

Under the "state-created danger" test, a Plaintiff may recover if she proves:

1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. *Cartwright*, 336 F.3d at 493 (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir.1998)).

1. Affirmative Acts

For the purposes of this appeal, Appellant argues that several different affirmative acts establish the first prong of the *Cartwright* state-created danger test. First, Appellant argues that the IHRC's removal of her deadbolt despite its knowledge that it had not properly accounted for all master keys was an affirmative act. JA at 55; Appellant Br. 35. Second, she argues that the IHRC's failure to shorten the chain on her door, permitting unauthorized persons to enter the apartment building (be they illegal residents or vagrants), and distributing master keys without keeping appropriate records, all constitute affirmative acts. Appellant Br. 35–36.

We agree with the district court that most of these "acts" are more properly classified as omissions. Even if one of the handymen promised to shorten the chain (a promise neither the handymen nor the IHRC had an obligation to keep since, as Appellant admits, the chain was not permitted on the

door in the first place[1]), and even if the IHRC and the employee Defendants were aware of some illegal living situations (children of tenants were sometimes illegally residing with parents who were tenants), or that master keys were not fully accounted for, Defendants' failures to remedy those situations would still be more properly characterized as omissions or failures to act. This court has indicated that a "failure to act is not an affirmative act under the state-created danger theory." *Cartwright*, 336 F.3d at 493.

2. Deliberate Indifference[2]

Even if some of the remaining acts described by Plaintiff were affirmative acts, she must still prove that Defendants acted with deliberate indifference. She can not meet this very high burden of proving that "the state knew or should have known that its actions specifically endangered the plaintiff." *Cartwright*, 336 F.3d at 493 (citing *Kallstrom*, 136 F.3d at 1066). This court has previously held that to prove this last element of a state-created danger claim, a plaintiff must show deliberate indifference to the danger created by a defendant's affirmative act, rather than merely proving negligence. *Sargi*, 70 F.3d at 912; *Ewolski v. City of Brunswick*, 287 F.3d 492, 510–11 (6th Cir.2002). Even a showing of gross negligence will not suffice to meet a Plaintiff's burden in these types of cases. *Gazette v. City of Pontiac*, 41 F.3d

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[1] Chains were not permitted because they would prevent or delay access when elderly tenants required assistance.

[2] Because the deliberate indifference prong is determinative of Appellant's claim, we decline to address whether Appellant satisfies the second "special danger" prong of the state-created danger test.

1061, 1066 (6th Cir.1994). Rather, deliberate indifference is the appropriate standard when "circumstances allowed the state actors time to fully consider the potential consequences of their conduct." *Ewolski*, 287 F.3d at 510 (quoting *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 373 (9th Cir.1998)).

The IHRC received the HUD directive to remove the deadbolt locks and then had to implement that directive, meaning that it had ample opportunity to consider the ramifications of the directive before implementing it. In addition, the record does not indicate that maintaining control over master keys and resident lists was an especially taxing or time-sensitive task. Thus, deliberate indifference is the appropriate standard in this case.

Deliberate indifference, in this context, is akin to subjective recklessness "and requires the § 1983 plaintiff to show that the state 'official knows of and disregards an excessive risk to [the victim's] health or safety.' " *Ewolski*, 287 F.3d at 513 (footnote omitted) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)); *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 493 (6th Cir.2002). "Pursuant to this definition, 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.' " *Sperle*, 297 F.3d at 493 (quoting *Farmer*, 511 U.S. at 837); *Bukowski v. City of Akron*, 326 F.3d 702, 711 (6th Cir.2003). Therefore, to create a triable issue of fact, Appellant must present evidence that the state actors "knew or should have known that [their] actions specifically endangered the plaintiff" and that those actions occurred in disregard to Appellant's health or safety. *Ca wright*, 336 F.3d at 493; *Sperle*, 297 F.3d at 493.

Appellant presented no evidence that would satisfy such a

high standard. While this court might agree that removing the deadbolt before accounting for all master keys could constitute a negligent act, the deadbolt was removed at the direction of HUD to aid the IHRC in assisting its elderly residents in case of an emergency. Obviously, on the whole, the IHRC was attempting to decrease, rather than enhance, the level of danger to its elderly residents. In addition, while Plaintiff presented evidence that the City of Inkster, in general, has a high crime rate, Plaintiff presented no evidence that other crimes of a similar nature had previously occurred in the building or anywhere in the public housing complex that would make the IHRC aware of the potential for an assault such as Plaintiff suffered. Finally, none of the other acts that Plaintiff identified were undertaken with the requisite level of indifference. Because Appellant cannot prove that Defendants acted with deliberate indifference, the district court properly granted Defendants' motion for summary judgment.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the decision of the district court.

/s/_____

B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

LILLIAN BULLARD

Plaintiff,

v. Case No. 02-CV-74608

INKSTER HOUSING AND RE-DEVELOPMENT COMMISSION et al.,

Defendants.

_____/

JUDGMENT

In accordance with the court's November 26 2003 "Order Granting Defendant's Motion for Summary Judgment In Part and Dismissing Supplemental State Claims Without Prejudice.

IT IS ORDERED AND ADJUDGED that judgment is entered for Defendants Inkster Housing and Redevelopment Commission, Tony Love, Melody Coffee, Leontyne Montgomery, Floyd Simmons, and Ernestiine Carter, and against Plaintiff Lillian Bullard with regard to Counts I and II of Plaintiff's second amended complaint. Dated at Detroit Michigan, this day 26 of November 2003.

DAVID J, WEAVER

CLERK OF THE COURT

BY:Lisa Teets, Deputy Clerk and Case Manager to Judge Robert H. Cleland

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

LILLIAN BULLARD

Plaintiff,

v. Case No. 02-CV-74608

INKSTER HOUSING AND RE-DEVELOPMENT

COMMISSION et al.,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' "MOTION FOR SUMMARY JUDGMENT" IN PART AND DISMISSING SUPPLEMENTAL STATE CLAIMS WITHOUT PREJUDICE

Pending before the court is Defendants' August 18, 2003 'Motion for Summary Judgment" The matter has been fully briefed and the court has concluded that a hearing is not required. ED, Mich. LR 7.1 (e)(2). For the reasons set forth below, the court will grant the motion in part as to Plaintiffs federal claims and will dismiss the remaining state law claims without prejudice.

I. BACKGROUND

This case arises from an incident occurring on November 21, 2000 at the Twin Towers apartment complex located in the City of Inkster, Michigan. Plaintiff. a sixty two-year-old female, received a low income federal housing subsidy and leased public housing al Twin Towers. Defendant Inkster Housing and Redevelopment Commission ("IHRC") owns and operates the Twin Towers complex,

which also participates in federally subsidized housing programs.

On November 21, Plaintiff was beaten, stabbed, and raped by an unknown intruder in her apartment at the Twin Towers. After the attack Plaintiff was transported to a hospital where she spent significant time recovering from her injuries. Unfortunately, plaintiffs assailant has not been discovered nor prosecuted. Plaintiff filed the instant civil complaint against Defendant IHRC and several of its current or former employees alleging various theories of recovery against Defendants for their roles in failing to prevent or contributing to Plaintiffs attack. Her second amended complaint asserts the following grounds for recovery: (1) violation of substantive due process rights actionable under 42 U.S.C. § 1983; (2) violation of procedural due process rights actionable under 42 U.S.C. § 1983; (3) breach of contract; (4) gross negligence under Michigan law; (5) violation of Mich. comp. Laws § 125.471; and (6) violation of the Michigan Consumer Protection Act MCPA. Defendants have jointly filed a motion for summary judgment regarding all of Plaintiffs claims.

II. STANDARD

Rule 56 of the Federal Rules of Civil Procedure, which governs summary judgment motions, provides in part that:

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56 The moving party has the burden of demonstrating that there is no genuine issue as to any material fact, and a summary judgment is to be entered if the evidence is such that a reasonable Jury could find only for the

moving party. See Anders v Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). It is not necessary for the moving party to support its motion with affidavits or other similar forms of evidence; rather, the movant need only show that 'There is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 US. 317, 325(1986), [T] is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a Jury to return a verdict for that party. Anderson, 477 U.S. at 250. Therefore, the court must necessarily examine the evidence provided in a light that is most favorable to the non-moving party, United States v. Diebold, Inc., 369 U.S. 654,655(1962), and decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law'. Anderson, 477 U.S. at 261-252.

III. DISCUSSION

A. Plaintiff's Substantive Due Process Claim

In Count I of her second amended complaint, Plaintiff alleges that Defendants violated her right to substantive due process by failing to protect her, and that such violations are actionable under 42 U.S.C. § 1983. Plaintiff alleges that Defendants were responsible for the deprivation of her liberty interest, including her right to bodily integrity, to physical safety, and to be free from bodily harm, (Pl Second Amend. Compl. at 5.)

In short, Plaintiff seeks to hold government officials responsible for the acts of private violence that she suffered in her apartment at Twin Towers at the hands of an unknown assailant. Plaintiff bases her claim on the Fourteenth Amendment's Due Process Clause, asserting a claim under 42 U.S.C. § 1983. Section 1983 does not create substantive rights, but is merely a vehicle to enforce deprivations of constitutional rights.

See Graham v. Connor, 490 U.S. 386, 393-94 (1989). In order to establish a claim under 42 USC, § 1983. Plaintiff must show that Defendants: (1) acted under color of state law; and (2) deprived Plaintiff other rights under the United States Constitution or certain federal statutes, 42 USC. § 1983; Cartwright v. City of Marine City, 336 F.3d 487. 491 (6th Cir. 2003); Upsher v Grosse Pointe Pub. Sch. Sys.. 285 F.3d 448, 452 (6th Cir. 2002). Defendants do not dispute that they were acting "under color of law," and therefore, the court will turn to whether a material issue of fact exists regarding the alleged deprivation of Plaintiffs substantive due process rights.

The Due Process Clause of the Fourteenth Amendment does not impose upon the state an affirmative duty to protect its citizens against private acts of violence, but rather places limitations on affirmative state action that denies life, liberty, or property without due process of law. Kallstrom v. City of Columbus, 136 F,3d 1055, 1065-66 (6th Cir. 1998) (citing Deshaney v. Winnebago County Dept of Soc. Serv.,. 489 U.S. 189, 195 (1989). The Fourteenth Amendment's Due Process Clause was intended to prevent the government from abusing its power or employing it as an instrument of oppression. DeShaney, 489 U.S. at 196. "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." Id.

Although DeShaney v. Winnebago sets forth the general rule for determining governmental under the Constitution for acts committed by private actors, the Sixth Circuit has recognized two limited exceptions to this rule. Cartwright v. City of Marine City, 336 F.3d 487, 491 (6th Cir. 2003); Sargi v.. Kent City Bd. of Educ., 70 F.3d 907, 910 (6th Cir, 1995).

The first exception applies when the state creates a Special relationship" by taking the plaintiff into custody, Sargl, 70 F.3d at 911; Stem v. City of Florence, 126 F,3d 856, 867-68

(6th Cir. 1997). "The state has a duty to protect a citizen 'when the State by the affirmative exercise of its power so restrains an individuals liberty that it renders him unable to care for himself, and at the same lime fails to provide for his basic human needs.' Cartwright, 336 F.3d at 492 (quoting Deshaney 489 U.S. at 200). The special relationship only arises when the state restrains an individual. Id. (cithg rgi 70 F.3d at 911). It is the actual affirmative act of restraining an individuals freedom to act on his own behalf which may be a "deprivation of liberty under the Due Process Clause." DeShaney, 489 U.S.. at 200.

The second exception is often called the state created danger exception. Cartwright, 336 F.3d at 493; Kallstrom, 336 F.3d at 1066 (holding that liability may exist under the Due Process Clause where state's affirmative acts either create or increase the risk of private violence). The Sixth Circuit has recently described the requirements that Plaintiff must establish to trigger this exception.

> To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the pub at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff.

Cartwright,. 336 F.3d at 493 (citing Kallstrom, 136 F.3d at 1066). Additionally, in state- created-danger actions, the requisite intent of state officials must rise to the level of deliberate.indifference. Gazeytte v. City of Pontiac, 41 F.3d 1061 1066(6th Cir. 1994); Robinson v. Township of Redford,

No.01-1196, 2002 WL 31398974. 3 (6th Cir. Oct.17, 2002). Neither simple nor gross negligence on the part of state officials is sufficient to support a finding of a constitutional violation. Robinson, 2002 WL 31398974 at 3 (citing Gazette, 41 F.3d at 1066). Deliberate indifference requires a § 1983 plaintiff to show that the state official knows of, and disregards, an excessive risk of harm to the plaintiffs health or safety. Ewolski v. City of Brunswick, 287 F3d 492, 510 (6th Cir 2002) (citing Farmer v. Brennan, 511 U.S. 525(1994)).

Because many state activities have the potential to increase an individual risk of injury, the Sixth Circuit requires plaintiffs alleging a § 1983 action based on the state- created-danger theory to establish special danger." Kallstrom, 136 F.3d at 1066. A victim can establish "special danger when 'the states actions place the victim specifically at risk, as distinguished from a risk that affects the public at large. Id. (citing Jones v. City of Carlisle, a F.3d 945, 949 (6th Cir. 1993)). In other words, "the state must have known or clearly should have known that its actions specifically endangered an individual. Id. (citing Janan v. Trammell, 785 F.2d 557, 560 (6th Cir. 1986).

The court finds that Defendants are entitled to summary judgment on Plaintiff's first count alleging a § 1983 cause of action for violating her substantive due process rights because there is no genuine issue of fact that would permit a reasonable jury to conclude that either exception to the general rule laid out in Deshaney applies in this case.

1. Special Relationship Exception

First Plaintiff was not in custody nor does she provide evidence of a special relationship that would trigger the government's duty to protect her. Plaintiff fails to direct the court to any affirmative exercise of the state's power that restrained her liberty in a manner that rendered her unable to

care for herself. Plaintiff, by her own choice, signed a Lease agreement and resided at the Twin Towers apartment complex. Therefore, the court will turn to whether the conduct of Defendants in this case creates an issue of fact on whether the state-created danger exception is triggered.

2. State-created Danger Exception

Plaintiff has failed to establish a genuine issue of fact regarding the state-created danger exception for two reasons. First, Plaintiff does not provide evidence of affirmative acts by Defendants that increased the risk that she would be exposed to special danger from the violent acts of a third party. Although Plaintiff argues that Defendants committed affirmative acts, most of the conduct by Defendants that Plaintiff alleges increased the risk of harm to her is more appropriately characterized as a failure to act.

The Sixth Circuit has noted that the distinction between state action and omission may blur, making it difficult to determine the state's role in creating the dangerous situation. Robinson. 2002 WL 31398974 at *4 However, the Sixth Circuit has also recognized that failure to act is not an affirmative act under the state-created danger theory. Cartwright, 336 F.3d at 493; DeShaney, 489 U.S. at 197. The first element in establishing a state-created danger claim under § 1983 requires Plaintiff to show evidence of an affirmative act that either created or increased the risk that she would be exposed to the acts of violence by a third party.

Plaintiff argues that she has produced sufficient evidence showing such affirmative acts by Defendants. Plaintiff argues that the evidence shows that a reasonable jury could find that her assailant entered her apartment through the use of a master key. She offers the following evidence of affirmative acts by Defendants and argues that they increased the likelihood that she would be harmed by a third party. First, she offers evidence that Defendants failed to keep accurate

records of master keys for the Twin Towers apartment complex. (Pl's Resp, at 9-10 Ex. L.) Second, Plaintiff offers evidence that Defendants had no written or oral policy regarding the dissemination of master keys. (Id.) Third, Plaintiff argues that Defendants permitted residents to maintain master keys for the purposes of letting locked-out residents into the building. Plaintiff offers evidence that some of IHRC's management thought it unsafe to permit residents to have master keys and points to Defendants own list of residents with master keys arguing that at least four residents were issued such keys. (Pl's Resp. at 9-10; Simmons Dep. at 14-71; Carter Dep. at 30-32.) Fourth, Plaintiff claims that Defendants permitted unauthorized residents to live at Twin Towers and failed to conduct criminal background checks on some of its residents. (P Resp, at 13.) Fifth, Plaintiff claims that Defendants failed to cure known security violations and risks. Sixth, Plaintiff argues that Defendant IHRC's decision to remove the dead-bolt locks on all of its apartment units was an affirmative act increasing the risk that she would be injured by a third-party assailant.

Most of Plaintiffs allegations cannot satisfy the affirmative act element of a state-created danger claim. Failing to keep accurate records of master keys, failing to implement a policy for disseminating and controlling master keys, permitting unauthorized residents to live at Twin Towers, failing to conduct criminal background checks on residents, and failing to corrector repair security violations or risks are all omissions. Thus, the only two possible affirmative acts are (1) the decision to issue master keys to four residents, and (2) the affirmative removal of all private dead-bolt locks from the apartment units.

Even assuming these two acts meet the first element of a state-created danger claim for violation of substantive due process under § 1983. Plaintiff cannot establish that either of these two acts created a special danger or that Defendants

conduct would permit a reasonable jury to concluded that it acted with deliberate indifference.

To meet the second element of a state-created danger claim, Plaintiff must show 'a special danger to (her) wherein the state actions placed [her] specifically al risk, as distinguished from a risk that affects the public at large." Cartwright, 336 F,3d a 493. First, the Defendant IHRCs decision to remove privately installed dead-bolt locks from residents' apartments was made pursuant to a directive from the Department of Housing and Urban Development. Defendant IHRC implemented the policy of removing the private deadbolt locks so that it would have access to all of its residents apartments in the case of emergency. (Defs' Mot. at 3 & Exs. 3, 4.) Specifically, emergency personnel could be hindered from aiding an injured tenant if the unit could not be accessed. As such, the court finds that a reasonable jury could not conclude that this was an affirmative act that created a special danger that Plaintiff would be exposed to the violent assault from a third-party or that such an act demonstrates a deliberate indifference to the safety of Plaintiff.

The affirmative act of giving master keys to residents to let lock-out residents into their apartments requires a more detailed analysis. A reasonable jury could conclude that this affirmative act increased the risk that Plaintiff would be exposed to her assailant. The critical questions, however, are (1) whether this decision to give keys to several residents for limited purposes created a "special danger" to Plaintiff and (2) whether such a decision would permit a reasonable jury to find that Defendants acted with deliberate indifference to such a risk.

The evidence shows that four residents had master keys. Lewis Cooley was given a master key by Defendant Montgomery. A master key was also held by desk workers

Patricia Sealie, Caroline Powell, and Gerry Kaderbeck. Defendants claim that IHRC discussed the reliability of these individual's with management before issuing the master keys. Plaintiff claims Defendants failed to implement any controls on the dissemination and tracking of these master keys and the dissemination of master keys to residents was a known security risk. Plaintiff offered evidence that an independent contractor and another non-resident likely made use of a master key. She also provides evidence that a master key was accessible at the front desk of the apartment complex and that several other people may have used master keys.[3] However Plaintiff offers no specific evidence that Defendants provided a master key to any person who was not reliable or who may have ties to others who potentially could inflict criminal harm to Plaintiff specifically.

In the absence of a special relationship between the state actors and either the victim or private assailant, Plaintiff faces special danger when the Defendants actions place her specifically at risk, as distinguished from the a risk affecting the public at large, Kallstrom, 136 F.3d at 1066. Kallstrom was the first case in which the Sixth Circuit actually held a state actor liable for private acts of violence under the state-created danger exception. Kallstrom is, therefore, instructive as to what conduct creates a special danger.

In Kallstrom, the court held that a city's policy of freely releasing certain information from the personnel files of undercover police officers to a defense lawyer representing eight criminal defendants from a violent gang who were the

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[3]Plaintiff offers evidence that a resident named Maggie used a master key, once to enter Plaintiff's apartment. She also provides evidence that others had access to master keys including an employee from an independent contractor, a man known as Jack who did periodic cleaning work at Twin Towers, and Dwight Cboate--a person allegedly not permitted to enter the apartment complex. (Pl's Resp. at 11.)

subject of the undercover officers' investigation created a danger for the undercover officers and their families. The plaintiffs in Kallstrom were undercover police officers who testified against the defense lawyer's clients, suspected gang members with the potential to retaliate against the officers. In that case, the Sixth Circuit found that the release of private information concerning the officers to defense counsel rises to constitutional dimensions by threatening the personal security and bodily integrity of the officers and their family members. 136 F.3d at 1064.

In finding that special danger existed in Kallstrom, the Sixth Circuit specifically noted "we do not mean to imply that every governmental act which intrudes upon or threatens to intrude upon an individual's body invokes the Fourteenth Amendment. But where the release of private information places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat, the magnitude of the liberty deprivation . . strips the very essence of personhood." Id. (quoting Doe v. Claiborne County, 103 F.3d 495, 506-07 (6th Cir. 1996)),

The court found that the City's affirmative act of releasing confidential information of the undercover officers to the lawyer that represented the subjects of their investigation substantially increased the officers and their famijies vulnerability to private acts of vengeance. Id. at 1067. As such, Kallstrom provides the lead example of special danger applied in the context of a state-created danger claim.

Defendants' affirmative acts in the current case do not give rise to a special danger. Plaintiff argues that she has demonstrated that Defendants actions created a special danger to her as a resident of Twin Towers and that Defendants should have known that its uninhibited distribution of master keys" created a risk that Plaintiff would be harmed by a third party. However, unlike the plaintiffs in

Kallstrom. Plaintiff has not produced evidence that Defendants gave master keys to a person that would substantially increase the vulnerability of Plaintiff. In Kallstrom the court found special danger when the city gave confidential information about undercover officers to the lawyer who represented the criminal defendants. Thus, the affirmative act created a special danger because the threat of retaliation and harm from the members of a criminal gang was specific. The same cannot be said for Plaintiffs case. Although the acts of giving out master keys to residents without a policy for tracking or monitoring these keys might show negligence or gross negligence on behalf of Defendants, it did not specifically give rise to a special danger that threatened Plaintiff individually. It Plaintiff had produced evidence linking the four residents or other Defendants having master keys to a person with a propensity for violent acts or criminal conduct, then she would be one step closer to meeting the requirements of special danger" set forth in Kallstrom. The individualization of the a perceived threat to Plaintiff, however, would still be absent. Plaintiffs does offer evidence that Pat Sealie, an employee with access to a master key, was married to Gerald Sealie and that Gerald Sealie may have lived with Pat Sealie at Twin Towers and that he had spent some time in prison. Plaintiff however, does not provide evidence of an affirmative act by Pat or Gerald Sealie that created a special danger to Plaintiff individually. As such, Plain has failed to provide evidence upon which a reasonable jury could conclude that she was in special danger because of the affirmative acts of the Defendants.

Moreover, Plaintiff has not demonstrated that Defendants affirmative acts of giving master keys to residents rises to the level of deliberate indifference because Plaintiff has failed to offer evidence that would permit a reasonable jury to conclude that the persons selected and given a master key

demonstrate that Defendants acted in the face of, and despite, a known risk to Plaintiff individually.

The court is not insensitive to the sympathetic facts presented by this case. The Supreme Court was faced with a sympathetic set of facts in Deshaney. It noted:

Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for [to receive adequate compensation for the grievous harm inflicted" Deshaney, 489 U.S. at 202-03. However, the Supreme Court also cautioned that before "yielding to that impulse it is well to remember once again that the harm was inflicted not by the [state] but by [a private actor.] Id. at 203. The current Plaintiff was assaulted by an unknown private actor, not a state official. Although the alleged acts and omissions by Defendants regarding the security controls at Twin Towers may rise to the level of negligence or gross negligence, the Due Process Clause requires a much higher degree of culpability on behalf of government actors. Negligence liability attaches under state law, not the Due Process Clause. See Id..

Accordingly, The court will grant Defendants summary judgement on Plaintiffs § 1983 claim for violation of her substantive du process rights.[4]

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[4] Plaintiffs second amended complaint also alleges "a right to secure/safe public housing as set forth in 42 U.S.C. § 1437:' (Pl's Second Amend. Compl. at 5.) Defendants motion argues that Plaintiff cannot state a claim for violation of statutory rights under 42 U.S.C. § 1437 by using § 1983. Defendants argue that 42 U.S.C. 1437 is a broad statement of legislative policy and is not specific enough to confer actionable rights under § 1983. Plaintiffs response fails to address this issue and therefore the court deems such a claim waived. Furthermore, Plaintiff's response recognizes that other jurisdictions have held that § 1437 is not enforceable

B. Plaintiff's Procedural Due Process Claim

Count I of Plaintiff's second amended complaint alleges a violation of her procedural due process rights actionable via §

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through the substantive due process prong of the Due Process Clause of the Fourteenth Amendment. (Pl's Resp. at 20.)

Under § 1983 Plaintiff may bring a private right of action against anyone, who, under color of state law, deprives a person of rights, privileges, or immunities secured by the Constitution or conferred by some federal statutes. Blessing v. Freestone, 520 U.S. 329, 340(1997); Clarke v. Portage County, 281 Fad 602, 603(6th Cir. 2002). When determining whether a statutory provision gives rise to a federal right, the court must ask: (1) whether the plaintiff is an intended beneficiary of the statute; (2) whether the plaintiff's asserted interests are so vague and amorphous as to be beyond the competency of the judiciary to enforce them; and (3) whether the statute imposes a binding obligation on the State. Id. Plaintiff must assert a violation of a federal statutory right not merely a violation of federal law. Plaintiffs response fails to address any of these three requirements. Moreover, Plaintiff has failed to identify the specific part of 42 U.S.C. § 1437 that creates statutory federal rights enforceable under § 1983.

Even if Plaintiff had not waived her argument, the court has examined 42 U.S.C. § 1437 and determined that it does not identify her as an intended beneficiary and the asserted interests under 1437 are too vague and amorphous for competent judicial enforcement via § 1983. Section 1437 has two basic parts. Section 1437(a) is a "Declaration of Policy" and does not create substantive rights. Section 1437(b) describes the Public housing agency organization' and also does not create substantive rights. Plaintiffs general allegation in her complaint is simply not supportable under the general provisions of § 1437. See also Banks v, Dallas Housing Authority, 271 F.3d 605, 609-10 (5th Cir. 2001) (holding that 42 U.S.C. § 1437f(e) did not created federal statutory right actionable under § 1983, requirement that owners keep their housing units 'decent sate and sanitary" too indefinite to create legally cognizable rights)

1983. In the Sixth Circuit a plaintiff can recover on a § 1983 action for violation of procedural due process rights through one of two methods: (I) by demonstrating that he's deprived of property as a result of an established state procedure that itself violates due process rights; or (2) by proving that the defendants deprived him of properly pursuant to a random and unauthorized ect and that available state remedies would not adequately compensate for the deprivation or loss. Macence v. MJW Inc., 951 F 700 706 (6th Cir. 1991); Hearns Concrete Construction Co. v. City of Ypsilanti, 241 F. Supp. 2d 803, 810-11 (ED. Mich. 2003). The procedural prong of the Due Process Clause of the Fourteenth Amendment does not restrict the government from making a substantive choice to infringe upon a persons life, liberty, or property interest. Howard v. Grinage, 82 F.3d 1343. 1349(6th Cir. 1996). It simply requires that the government provide 'due process' before making such a decision. Id. The touchstone of procedural due process is that an individual be given the opportunity to be heard in a meaningful manner before the government deprives them of their liberty or property interest. Id

"Procedural due process claims do not implicate the egregiousness of the government action itself, but only question whether the process accorded prior to the deprivation was constitutionally sufficient". Id. at 1349. The focus is on the process provided, not on the nature of the rights. Plaintiffs bringing damage suits for deprivation of property without procedural due process have the burden of pleading and proving the inadequacy of state processes, including state damage remedies. Bowers v. City of Flint, 325 F3d 758, 762 (6th dir. 2003); Mansfield Apartment Owners Ass v. Mansfield, 988 F.2d 1469, 1475 (6th Cir, 1993). Furthermore, post-deprivation tort remedies are all the process that is due , , , [they are the only remedies the State could be expected to provide: Zinermon v. Burch, 494 US.

113, 128 (1990). "The very nature of a negligent loss of property [makes] it impossible for the State to predict such deprivations and provide predeprivation process." Id. at 129.

Plaintiff alleges that she had a legitimate entitlement and therefore a property interest in safe housing. Plaintiff alleges that this property interests created by Michigan and federal law. She claims that Mich. Comp. Laws § 125.694,125.471, 125.602 and 125.677 as well as 42 USC. 1437 create her protected property interest in safe housing. The court however, need not examine whether these statutes create a protected property interest because Plaintiffs claim fails for other reasons.

Even assuming that Plaintiff has a property interest in "safe" housing,[5] the alleged acts by Defendants in this case do not intentionally deprive her of such an interest. As discussed above, Defendants would only be responsible for her deprivations based on their negligence or gross negligence. As such, Plaintiff will receive all the process that she is due for such a deprivation based on her post deprivation tort remedy available under Michigan law. See Burch, 494 U.S. at 128. To hold otherwise would mean that Defendant IHRC would have to provide notice and an opportunity to be heard for each of its residents regarding any action that its employees wanted to lake to provide safe housing. Because

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[5] The court also rinds that Plaintiff's argument in support of Defendants alleged violation of her procedural due process rights is substantially similar to her argument regarding substantive due process. Plaintiff attempts to argue that she has a property interest in ! housing. Her interest, however, is more properly characterized as two distinct interests: (1) a property interest in her apartment; and (2) a liberty interest to be free from individual harm. The facts show, and Plaintiff does not dispute, that she was never denied access to her apartment, Thus, Plaintiff cannot argue that she was denied her property interest (Pl's Second Amend. Compl. at ¶ 41), but only that she was denied her property interest in safe housing.

Defendant IHRC could not predict when third parties might exploit the proverbial chink in its security armor, such an outcome would be absurd.

In short, Plaintiff has tailed to produce evidence that would permit a reasonable jury to conclude that she was deprived a property interest as a result of an established state procedure that itself violates due process rights or that Defendants deprived her of property pursuant to a random and unauthorized act and that available state remedies would not adequately compensate for the deprivation or loss. First, Plaintiff argues that she was deprived of her property interest by Defendants! failure to act. Plaintiff does not identify an established state policy responsible for her loss. In fact, she provides evidence of Defendants' lack of a policy regarding its master keys as a critical point in why they failed to protect her and violated her substantive due process rights. The customs or policies allegedly causing her a deprivation of her property interest included failing to correct dangerous and defective conditions, failing to maintain security or safety devices, permitting dangerous conditions to exist, failing to have a master key dissemination policy, and allowing tenants, employees, and other unknown persons to disseminate or use master keys are omissions, not affirmative procedures that denied her rights. (Pl's Second Amend. Comp at ¶146.)

Second, Plaintiff has failed to plead or provide evidence that could establish that her post-deprivation state tort remedies would not adequately address her loss. Therefore, the court will grant Defendants summary judgment on Plaintiff's § 1983 claim for violation of procedural due process rights.[6]

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[6] Count II of Plaintiff's second amended complaint avers that her property interest in the subsidized public housing program was denied because Defendants violated 42 U.S.C. § 13601 et seq. by allowing individuals who did not meet the occupancy criteria to

C. Plaintiffs Supplemental State Law Claims

The court has determined that the dismissal of Plaintiffs federal question claims is proper under Rule 55 and therefore Plaintiffs basis for recovery depends on her state law theories and claims. Plaintiffs remaining state claims are breach of contract, gross negligence. violation of Mich. Comp. Laws 125.471, and violation of the Michigan Consumer Protection Act ("MCPA")

Plaintiffs complaint was filed in federal court based on her § 1983 claims for deprivation constitutional rights. (Pl Second Amend. Compl. at 2.) The court does not have original jurisdiction over the remaining state law claims. Rather, it has federal jurisdiction over her state law claims through the exercise ot supplemental jurisdiction set forth in 28 U.S.C. § 1367. Section 1367 provides, in part:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.

Supplemental jurisdiction under 28 U.S.C. § 1367 'is a doctrine of discretion, not of plaintiff's right." McDonald v. United States, 2003 WL 22073159, (ED. Mich. July 21.2003) (citing Habich v. City of Dearborn, 331 F.3d

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live at Twin Towers. Plaintiff, however, does not address this argument in her response and has failed to explain how any such violation deprived her of her procedural due process.

524.535(6th Cir. 2003)). Section 1367(c) specifically provides:

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law;

(2) the claim substantially predominates over claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all c over which it has original jurisdiction or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 USC. § 1367(c) (emphasis added).

Upon reading Plaintiffs second amended complaint and the briefs for the pending motion for summary judgment by Defendants, it appears that Plaintiff's supplemental state law claims require significant interpretation and analysis under Michigan law. Having determined that the remaining state law claims are not supported by original jurisdiction and that state law interpretation predominates the remaining claims, the court finds these mailers are best bandied by the Michigan state courts. This court does not express any opinion regarding the merits of the remaining state law claims. As such, the court will employ its discretion under 28 U.S.C. § 1367(d) and will dismiss Plaintiffs remaining supplemental claims without prejudice.

The parties should also note the tolling provisions found in 28 U.S.C. § 1367(d), Section 1367(d) states, in relevant part. the period of limitations for any claim asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period. Furthermore, the U.S. Supreme Court has recently upheld the constitutionality of § 1367(d) and determined that its tolling provisions also

apply to claims brought against a State's political subdivisions. Jinks v. Richland County, 123 S.Ct. 1667,1672.73 (2003). The Court stated "[t]o prevent the limitations period on such supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court, § 1367(d) provides a tolling rule that must be applied by state courts." Id. at 1669.

V. CONCLUSION

For the reasons state above, IT IS ORDERED that Defendants August 18, 2003 Motion for Summary Judgment [#37] is GRANTED IN PART. The court grants Defendants motion as to Plaintiff's § 1983 claims for violation of her procedural and substantive due process rights. The court will enter judgment in Defendants favor on these claims by separate order.

IT IS FURTHER ORDERED that the court lacks original jurisdiction over all of Plaintiffs remaining state law claims and that they are DISMISSED WITHOUT PREJUDICE.

ROBERT H.
CLELAND

UNITED STATES
DISTRICT JUDGE

Dated: November 26 2003

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No. 04-1051

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LILLIAN BULLARD,

Plaintiff-Appellant,

V.

INKSTER HOUSING AND REDEVELOPMENT COMMISSION, ET. AL.

Defendant-Appellees.

BEFORE: BOGGS, Chief Judge, KENNEDY and MARTIN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk